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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

VENTURA COUNTY COMMERCIAL FISHERMEN'S ASSOCIATION, et al., Plaintiffs and Appellants, v. CALIFORNIA FISH AND GAME COMMISION, ET AL., Defendants and Respondents.	2d Civil No. B166335 (Super. Ct. No. 215942) (Ventura County)

Ventura County Commercial Fishermen's Association, United Anglers of Southern California, Pacific Coast Federation of Fishermen's Associations, Commercial Fishermen of Santa Barbara, Inc., Southern California Commercial Fishing Association, Sea Urchin Harvesters Association of California, California Lobster and Trap Fishermen's Association, Recreational Fishing Alliance/Southern California, and Sportfishing Association of California appeal from an order denying their motion for a temporary restraining order (TRO) to enjoin implementation of the Channel Islands Marine Protected Area Project (MPA). The MPA creates "no take" fish zones in the

Channel Islands National Marine Sanctuary off the Santa Barbara Coast.[1] (Cal. Code Regs., tit. 14, § 632.)

The trial court denied the TRO on the ground that it was not reasonably likely that appellants will prevail at trial and because the interim harm appellants will suffer was not greater than the harm the state was likely to suffer if the TRO was granted. We affirm.

Facts and Procedural History

On October 23, 2002, respondents California Department of Fish and Game and California Fish and Game Commission (Commission) adopted regulations to establish a network of Marine Protected Areas at the Channel Islands National Marine Sanctuary. (Cal. Code Regs., tit. 14, § 632.) Operative April 9, 2003, the regulations prohibit or restrict the "take of fish" and certain acquatic wildlife near Anacapa, Santa Cruz, San Miguel, Santa Rose, and Santa Barbara Islands. (*Ibid.*) The MPA network closes 19 percent of the state waters around the islands to commercial and recreational fishing, and is designed to restore fish and aquatic resources.[2] In adopting the regulations,

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[1] Although the Channel Islands National Marine Sanctuary is a national monument, the State of California has dominion over submerged lands and waters within one-mile belts around the islands. (See, *United States v. California* (1978) 436 U.S. 32 [56 L.Ed.2d 94].)

[2] The MPA Project is the culmination of three years of studies and a federal-state partnership to establish marine reserves in the Channel Islands National Marine Sanctuary. In 1999 the California Legislature enacted the Marine Life Protection Act (Fish & Game Code, § 2850 et seq), directing Commission to develop a master plan for the adoption and implementation of a network of MPAs to sustain, conserve, and protect marine life populations.

In 1999, the Channel Islands National Marine Sanctuary Advisory Council formed a stakeholder community-based group (Marine Reserves Working Group) to evaluate the establishment of MPAs around the Channel Islands. The group included state and federal agencies, recreational and commercial fishing groups, conservation interests, the public at large, and the California Sea Grant Program. The Channel Islands National Marine Sanctuary Advisory Council also created a Science Advisory Panel and a Socio-Economic Panel to develop MPA criteria, evaluate different marine reserve scenarios,

(Fn. cont'd.)

Commission certified a final environmental document (FED), as required by the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.).

Appellants, a group of nine commercial and sportfishing associations, filed a mandamus petition and complaint for declaratory relief. The first amended complaint alleged that (1) Commission violated the Administrative Procedure Act (Gov. Code, § 11340 et seq) in adopting the regulations, (2) that the final environmental document (FED) does not comply with CEQA, (3) that the regulations violate the California Constitution which guarantees the right to fish, (4) and Commission's approval of the MPA Project was invalid because the commissioner casting the definitive vote was appointed by the governor but the appointment was not yet approved by the Senate.

Appellants sought an ex parte TRO on the ground that the MPA Project will cause loss of jobs and irreparable economic harm. The trial court denied the TRO. In a March 26, 2003 minute order, it found that "approval of the environmental impact report is a quasi-legislative act, as is the approval of the regulations. After reading the voluminous exhibits submitted by the parties, the court concludes that: "A stay is against the public interest; the likelihood that plaintiffs will ultimately prevail in the litigation is not proved to be likely; and the interim harm to plaintiffs compared to the interim harm to the interests of the state is not proved to be comparably greater."

(Fn. cont'd.)
collect baseline economic data, and study the socioeconomic effects of each marine reserve scenario.

Based on the recommendations of the Marine Reserve Working Group, the Channel Islands National Marine Sanctuary Advisor and its advisory panels, the Channel Islands National Marine Sanctuary Manager, and the California Department of Fish and Game, Commission drafted regulations for the MPA Project and undertook its own public and environmental review process.

Appellants petitioned this court for a writ of supersedeas, which was denied. Pursuant to appellants' motion, we ordered that the appeal be expedited.

Discussion

In determining whether to grant or deny a TRO, a trial court must consider the likelihood that the plaintiff will prevail on the merits at trial and weigh the interim harm to plaintiff if the TRO is denied against the harm defendant will suffer if the TRO is granted. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70.) "Where the trial court engages in both parts of this analysis, an order granting or denying a [restraining order] will be reversed only for abuse of discretion." (*Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1138.)

Even though adoption of the MPA regulations was a quasi-legislative act, appellants assert that certification of the final environmental document (the FED) was a quasi-judicial act and subject to an administrative mandamus standard of review. (Code Civ. Proc., § 1094.5.) In an administrative mandamus proceeding, the trial court may stay enforcement of the regulations pending trial based on a showing that the public will not be harmed. (Code Civ. Proc., § 1094.5, subd. (g); Cal. Administrative Mandamus (Cont.Ed.Bar 3rd ed. 2003) § 11.11, p. 415.)

Respondents correctly argue that the traditional mandamus standard of review applies where the plaintiff challenges an agency's quasi-legislative action and accompanying environmental decision. (Code Civ. Proc., § 1085; *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.App.4th 559, 567.) The dominant purpose of Commission's action was to adopt regulations for implementation of the MPA Project. (*Ibid.*; *Del Mar Terrace Conservancy, Inc. v. City Council* (1992) 10 Cal.App.4th 712, 720.) As a traditional mandamus action, the trial court had no statutory authority to order a stay. (Kostka & Zichke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2003) § 23.83, p. 1003.) Before it could issue a TRO to enjoin enforcement of the regulations, the trial court was required to consider the likelihood that appellants would prevail at trial and balance the relative hardships. (E.*g.,*

King v. Meese (1987) 43 Cal.3d 1217, 1226; *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554, 1560-1561.)

Balancing of Harm

Appellants argue that the order denying the TRO is subject to de novo review because respondents submitted no evidence of comparative harm. They claim that there are no equities to balance. Appellants, however, seek injunctive relief by way of an ex parte temporary restraining order. The burden is on them to show interim harm and the likelihood of prevailing at trial.

Where the defendants are public agencies and the plaintiff seeks to restrain the performance of their duties, public policy considerations come into play. (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 401.) "The codes, embodying a settled principle of equity jurisprudence, prohibit the granting of injunctive relief 'To prevent the execution of a public statute by officers of the law for the public benefit.' (Code Civ. Proc., § 526, 2d subd. 4; Civ. Code, § 3423, subd. Fourth.) That rule is here applicable, inasmuch as a regulation adopted by a state administrative agency pursuant to a delegation of rulemaking authority by the Legislature has the force and effect of a statute. [Citations.]" (*Ibid.*)

Although appellants predict irreparable economic harm, the declarations in support of the TRO are speculative, conclusory, and lack foundation. (Code Civ. Proc., § 527; *North Shuttle Service, Inc. v. Public Utilities Com.* (1998) 67 Cal.App.4th 386, 395-396; *Ancora-Citronelle Corp. v. Green* (1974) 41 Cal.App.3d 146, 150.) In a mandamus action challenging an agency's quasi-legislative administrative decision, evidence outside the administrative record is generally not admissible. (*Western States Petroleum Assn. v. Superior Court, supra,* 9 Cal.4th at p. 578; Kostka & Zichke, Practice Under the Cal. Environmental Quality Act, *supra,* § 23.47, p. 964.)

The record here refutes appellants' claim of dire economic harm to the fishing industry. It includes economic studies predicting that the maximum annual loss to commercial fishing in state waters will be 16.5 percent or $3.3 million. The projected

maximum loss of annual income for recreational fishing will be $3.28 million. The studies indicate that MPAs rapidly increase fish population and biomass and will rebuild stock in fish areas accessible to appellants.[3] The spillover effect will offset appellants' projected losses. The administrative record states: "In the long term, the potential negative impacts are expected to be balanced by the positive impacts of sustainable fisheries, non-consumptive benefits, and ecosystem function in the reserve areas."

Substantial evidence supports the finding that the state will suffer great public harm if the MPA regulations are stayed pending trial. The Legislature has identified the public harm in declaring that "marine biological diversity is a vital asset to the state and nation. The diversity of species and ecosystems found in the state's ocean waters is important to public health and well-being, ecological health, and ocean-dependent industry. [¶] (c) Coastal development, water pollution, and other human activities threaten the health of marine habitat and the biological diversity found in California's ocean waters. New technologies and demands have encouraged the expansion of fishing and other activities to formerly inaccessible marine areas that once recharged nearby fisheries. As a result, ecosystems throughout the state's ocean waters are being altered, often at a rapid rate." (Fish & Game Code, 2851, subds. (b) & (c).)

The MPA Project was implemented because of a historic decline in fish stocks and degradation of marine habitats. The final environmental document (FED), which was certified by Commission, states that delays in implementing the project will result in a further decline of fish habitat and "could prevent rebuilding of overfished stocks and could lead to ESA [Endangered Species Act; 16 U.S.C. § 1531 et seq.] listings that would

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[3] "Despite the demonstrated value of marine life reserves, only 14 of the 220,000 square miles of combined state and federal ocean water off California, *or six-thousandths of 1 percent, are set aside as genuine no take areas*." (Fish & Game Code, § 2851, subd. (g); emphasis added.)

have dramatic negative consequences for the fisheries. There is no way to estimate or quantify those potential negative impacts."

We reject the argument that an ex parte TRO application may be used to reweigh evidence considered by Commission in adopting the MPA regulations. "The decisions do not sustain the [appellants'] contention that in determining the validity of the regulation this court should exercise its independent judgment and reweigh the proffered evidence. While such a test may apply to the review of the adjudicatory or quasi-judicial rulings of certain agencies (Code Civ. Proc., § 1094.5) it does not pertain to the review of regulations rendered by an agency in its quasi-legislative capacity." (*Pitts v. Perluss* (1962) 58 Cal.2d 824, 833.)

Likelihood of Success

The trial court, in denying the TRO, found that appellants failed to show a reasonable likelihood of prevailing at trial. There was no abuse of discretion. "A trial court may not grant a [restraining order], regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim. [Citation.]" (*Butt v. State of California* (1992) 4 Cal.4th 668, 678.)

Appellants' action is based on the theory that Commission, in adopting the MPA regulations, violated certain notice provisions of the Administrative Procedure Act. (APA; Gov. Code, § 11340 et seq.) None of the APA claims are supported by the record.

Government Code section 11346.4, subdivision (a) requires that the notice of proposed regulatory changes be mailed to interested parties "at least 45 days prior to the hearing and close of the public comment period on the adoption . . . of the regulation." The record shows that notice was issued January 25, 2002, well before the last public comment hearing on August 2, 2002.

Appellants argue that Commission advanced the hearing date for adoption of the regulations from December 2002 to October 23, 2002 without proper notice. On October 8, 2003, Commission gave notice that it would vote on adoption of the MPA Project on

October 23, 2002. Written notice was provided to all interested parties in compliance with the 10 day notice provisions of Government Code section 11125, subdivision (a).

Appellants claim that respondents violated the Bagley-Keene Open Meeting Act. (Gov. Code, § 11120 et seq.) The act permits special meetings "to consider proposed legislation," which is what occurred here. (Gov. Code, § 11125.4, subd. (a)(2).) Commission gave timely notice that the MPA regulations would be heard for final adoption on October 23, 2002.

Appellants' assertion that Commission violated Government Code section 11346.8, subdivision (c) by not providing notice of the changes between the original text of the proposed regulations and the regulations as adopted is without merit.[4] The regulations were adopted with minor changes. Commission was not required to give prehearing notice of the changes. (E.g., *Schenley Affiliated Brands Corp. v. Kirby* (1971) 21 Cal.App.3d 177, 193 [15 day notice provision did not apply where regulation as adopted was devoted to same subject or issue described in published notice].) "To require a new notice and hearing would tie the agency into time-consuming, circular proceedings transcending the statutory objective." (*Ibid.*)

Appellants contend that Commission violated Government Code sections 11346.3 and 11346.5, subdivisions (a)(10)-(a)(11) by not assessing the project's economic impact on jobs and business. Potential economic impacts are discussed in the Commission's

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[4] Government Code section 11346.8, subdivision (c) states in pertinent part: "No state agency may adopt. . . a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. If a sufficiently related change is made, the full text of the resulting adoption . . . , with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts . . . the resulting regulation."

Notice of Proposed Regulatory Changes and the Economic and Fiscal Impact Statement. Although appellants disagree with Commission's findings, courts give great deference to the conclusions of a public agency with respect to the agency's analysis of scientific and economic data. (*Western States v. Superior Court, supra,* 9 Cal.4th at p. 572.) " ' "A reviewing court does not superimpose its own policy judgment upon a quasi-legislative agency in the absence of an arbitrary decision; . . . in these technical matters requiring the assistance of experts and the collection and study of statistical data, courts let administrative boards and officers work out their problems with as little judicial interference as possible." . . .' [Citation.]" (*California Labor Federation v. Industrial Welfare Com.* (1998) 63 Cal.App.4th 982, 989.)

Appellants claim that Commission violated Government Code section 11346.4, subdivision (b) which requires that a proposed regulation be submitted to the Office of Administrative Law within a year of the notice of proposed changes in regulations.[5] Notice was mailed January 25, 2002. The regulations were timely submitted to the Office of Administrative Law on January 24, 2003.

"[T]he action of the agency comes before the court with a presumption of correctness and regularity. He who assails the agency's action, not its defender, has the burden of demonstrating invalidity. The burden of demonstrating absence of evidentiary

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[5] Government Code section 11346.4, subdivision (b) states: "The effective period of a notice issued pursuant to this section shall not exceed one year from the date thereof. If the adoption, amendment, or repeal of a regulation proposed in the notice is not completed and transmitted to the office within the period of one year, a notice of the proposed action shall again be issued pursuant to this article."

Regulations concerning recreational fishing are not subject to Government Code section 11346.4. (See Fish & Game Code, §§ 200, 202.)

support for the commission's action is upon [appellants]. They have not met it." (*Rivera v. Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 594-595, fn. omitted.)

CEQA

Appellants contend that the MPA Project violates the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.), as referenced in their trial brief and first amended complaint. Appellants, however, did not address the CEQA arguments in their opening brief, thereby abandoning the issue in this appeal. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn 4.) "An appellant cannot rely on incorporation of trial court papers, but must tender arguments *in the appellate briefs*. [Citation.]" (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 109.)

California Constitution

Appellants argue that article 1, section 25 of the California Constitution establishes the right to fish and, by implication, prohibits "no take" fish reserves.[6] Our Supreme Court has held that "the right to fish under article I, section 25 is not an unqualified

one. . . . [A]lthough the public has a constitutional right to fish, . . . this right is subject to reasonable regulation . . . ." (*State of California v. San Luis Obispo Sportsman's Assn.* (1978) 22 Cal.3d 440, 448; e.g., *California Gillnetters Assn. v. Department of Fish & Game* (1995) 39 Cal.App.4th 1145, 1154 ["right to fish" not a fundamental right].)

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[6] Article 1, section 25 of the California Constitution provides: "The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that may have been planted therein by the State; *provided, that the Legislature may by statute provide for the season when and the conditions under which the different species of fish may be taken*." (Emphasis added.)

Appellants have no constitutional right to deplete or destroy a fish preserve, in this instance, a marine sanctuary.

The Legislature, in the exercise of its regulatory powers, may protect and preserve fish and acquatic resources by imposing no-take zones. (*People v. Zankich* (1971) 20 Cal.App.3d 971, 980-981 [state may restrict taking of anchovies by closing fish area].) Article 4, section 20 of the California Constitution provides that the Legislature may delegate to the Fish and Game Commission "such powers relating to the protection and propagation of fish and game as the Legislature sees fit." In 1999, our Legislature enacted Fish and Game Code section 2860 which provides in pertinent part that "[t]he commission may regulate commercial and recreational fishing and any other taking of marine species in MPAs."

Certification Vote

Appellant argues that Commission's adoption of the MPA regulations violates the State Constitution because the deciding vote was cast by Commissioner Bob Hattoy. Commissioner Hattoy was appointed by the governor to fill a previous commissioner's term and voted on the MPA regulations before the Senate approved the appointment. (Cal. Const., art. 4, § 20, subd. (b); Gov. Code, § 1774, subd. (a).)

Commissioner Hattoy acted within the scope and apparent authority of the office to which he was appointed. The de facto officer doctrine bars appellants from collaterally attacking Commission's adoption of the MPA regulations. (*Fair Political Practices Com. v. Californians Against Corruption* (2003) 109 Cal.App.4th 269, 280.) " 'Persons claiming to be public officers while in possession of an office, ostensibly exercising their functions lawfully and with the acquiescence of the public, are *de facto* officers. . . . The lawful acts of an officer *de facto*, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it.' [Citations.]" (*In re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21, 42.)

Appellants' remaining arguments have been considered and merit no discussion.

The judgment (order denying ex parte temporary restraining order) is affirmed. Respondents are awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Steven E. Hintz, Judge

Superior Court County of Ventura

Ilson W. New and Nick Migliaccio, for Appellants.

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